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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1934

No. 653

HOSIERY MOTOR-MEND CORPORATION,
KAYSER HOSIERY MOTOR-MEND CORPORATION,
JULIUS KAYSER & COMPANY, a Corporation

Corporation,

vs.

THE STELOS COMPANY, INC.,

Respondent.

BRIEF IN OPPOSITION TO CROSS-PETITION

The Stelos Company, Inc., by its attorneys, answering the cross-petition filed herein by Hosiery Motor-Mend Corporation, Kayser Hosiery Motor-Mend Corporation, Julius Kayser & Company, a Corporation, for a writ of certforari, respectfully represents as follows:

The Stelos Company, Inc., filed its petition, No. 588, October Term 1934, for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit, predicated primarily upon a conflict as expressed in the decision of that

Court in this case (R.1341) and the decision of the Court of Appeals of the District of Columbia (46 Fed. (2d) 606), on substantially the same issue of interpretation and infringement of claim 23 of the patent in suit.

THERE WAS NO CONFLICT OF OPINION BETWEEN THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA ON THE QUESTION OF VALIDITY OF THE CLAIM (23) IN SUIT.

The validity of claim 23 was sustained not only by the Circuit Court of Appeals for the Second Circuit and by the Court of Appeals of the District of Columbia, in Finch Corporation vs. Stelos Company, 46 Fed. (2d) 606, but also, it has been sustained in The Stelos Company vs. Stark (D. C. Mo., W. Div.); The Stelos Company vs. Green-Jac Sales Co. (D. C. Mo., E. Div.); and in The Stelos Company vs. Gearhart (D. C. Pa.), 60 Fed. (2d) 1006, all of which cases involved practically the same issues of validity as have been raised in this case, and that is particularly true of the Finch and Gearhart suits. Like the decisions in those cases, the decision of the Circuit Court of Appeals for the Second Circuit also held that the prior patents, publications, and prior uses now sought to be urged in this Court by the cross-petition for certiorari are insufficient to anticipate or invalidate claim 23 of the patent in suit.

Cross-Petitioners have not urged any reason for the granting of the Cross-Petition which have not been urged in the Court below, without effect.

The rather narrow question presented by the petition of The Stelos Company, Inc., No. 588, namely, the interpretation of claim 23 of the patent in suit and the infringement

thereof, does not call for consideration of any prior art or prior uses except possibly one unintelligible British patent (publication) to Pogson, No. 168817 (R. 1127), which was referred to by the Patent Office Examiner. The scope of claim 23 over the prior art would not be involved on the petition filed by The Stelos Company, Inc., No. 588.

It would unnecessarily encumber the record on this appeal and complicate the issues involved to grant the cross-petition and permit the cross-petitioners to urge the issue of validity which has already been decided repeatedly by sustaining the validity of claim 23.

There was no conflict between the Circuit Court of Appeals for the Second Circuit and the Court of Appeals of the District of Columbia on the question of validity.

In the event that the petition of The Stelos Company, Inc., No. 588, should be granted, a new record would have to be printed in this Court, because the necessary number of printed copies as used in the Circuit Court of Appeals for the Second Circuit are not available. The printed record used in the Court below is made up very largely of patents, publications, and prior use testimony which is not necessary to a consideration of the issues raised by the petition of The Stelos Company, Inc., No. 588, and if this cross-petition should be granted, the cost of reproducing all of this material would be almost prohibitive. Since only a very small record would be required for the appeal of The Stelos Company, Inc., No. 588, the Court will be asked to permit a diminishing of the record by the omission of all the superfluous testimony and exhibits unnecessary for a consideration of the issues raised by the petition of The Stelos Company, Inc., No. 588.

The granting of the cross-petition for certiorari would impose a very substantial burden on The Stelos Company, Inc., which, it is believed, is wholly unnecessary.

THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA IS VESTED WITH THE SAME JURISDICTION AS A CIRCUIT COURT OF APPEALS WITHIN THE PURVIEW OF RULE 38, PARAGRAPH 5(b).

In opposing the granting of the petition by The Stelos Company, Inc., No. 588, cross-petitioners have urged that the conflict of decision between the Circuit Court of Appeals for the Second Circuit and the Court of Appeals of the District of Columbia, is not within paragraph 5(b), of Rule 38 of this Honorable Court. This is believed to be entirely erroneous in view of the terms of Sec. 240 (a) of the Judicial Code (U. S. C., sec. 347), and the decisions of this Court in *O'Donoghue vs. United States,* 289 U. S. 516, 545; in *Swift & Company vs. United States,* 276 U. S. 311, and in *Federal Trade Commission vs. Kelsner,* 247 U. S. 145.

The equal standing of the Court of Appeals of the District of Columbia and a Circuit Court of Appeals is further evidenced by the recent change in the name of the Court of Appeals of the District of Columbia to the United States Court of Appeals for the District of Columbia, which Act of Congress in changing the name of the Court recognized that the rank of the Court is equal to, and, in many respects, superior to a Circuit Court of Appeals.

Wherefore, the respondent prays that the cross-petition be dismissed with costs.

Respectfully submitted,

VERNON E. HODGES,
HENRY GILLIGAN,
J. PRESTON SWECKER,
Counsel for Respondent.

Washington, D. C.,
February 5, 1935.